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(4-P)

UNITED STATES GOVERNMENT
National Labor Relations Board

DOTEN PLEASE RELEASE

Memorandum

01673

TO : Roy H. Garner, Acting Regional Director
Region 28

DATE: APR 30 1986

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

506-0114
506-2017-2500
506-4033-9100
506-4033-9200
536-2509-9300
536-5050-6741
536-5075-0187
536-5075-5017-7000
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SUBJECT: Local 232, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO-CLC (Rainbow Bread)
Case 28-CB-2520

This case was submitted for advice as to whether (1) the filing of intra-union charges by a union member against a local union official is protected by Section 7 under Meyers Industries, Inc., 1/ and (2) a union's fining and threatening to fine a union member for bringing such charges violates Section 8(b)(1)(A) in the circumstances of this case.

FACTS

The Charging Party, Edmund Doten, filed an intra-union charge on July 6, 1985, criticizing the Business Agent for Local 232 of the Bakery, Confectionery and Tobacco Workers International Union (the Union), for his alleged failure to adequately represent employees in handling contractual grievances and other matters. 2/ At a trial conducted on August 10, 1985, Doten and other employees testified as to the alleged inadequate representation by the Business Agent. At the conclusion of the trial, the Executive Board issued its decision, finding the Business Agent not guilty and imposing a $1500 fine against Doten, which it then suspended. The Region has concluded that the Union levied the fine because Doten had filed the intra-union charges. On August 12, 1985, the Business Agent mailed a letter to all Union members describing the decision of the Executive Board, including its decision to fine the Charging Party. On November 4, 1985, the International Union upheld the actions of the Local.

After intra-union election campaigns had commenced in November of 1985, the Charging Party wrote to the Department of Labor on December 26 complaining about potential election improprieties. He is also pursuing these

1/ 268 NLRB 493 (1984), remanded sub nom. Prill v. NLRB, 755 F.2d 942 (D.C. Cir. 1985). See also Statements of Position in Meyers Industries and Herbert F. Darling, Inc., GC Memorandum 85-6, dated October 17, 1985.

2/ While Doten had filed the grievances at the request of other employees, there is no evidence that Doten filed the intra-union charge with or on the authorization of any other Union members.

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complaints via internal union channels. 3/ On January 3, 1986, the Local Union president sent a letter to Doten, stating that if he fails to prove the DOL and the internal union charges, the fine will be reinstated. On February 7, 1986, Doten filed the instant charge, alleging that the Union has violated Section 8(b)(1)(A) by, inter alia, its threat to reinstitute the fine because of his internal union and Department of Labor charges.

ACTION

Complaint should issue, absent settlement, alleging that the Union, by fining and threatening to fine, restrained and coerced the Charging Party in the exercise of his Section 7 rights. The Board's decision in Meyers Industries, Inc., supra, does not mandate a contrary result because the Charging Party's individual dissident union activity is inherently concerted.

It is well-settled that union dissident activity, including the right to criticize union leadership, is protected by Section 7 of the Act. 4/ In general, union interference with the exercise of rights otherwise guaranteed by the Labor-Management Reporting and Disclosure Act (LMRDA) violates Section 8(b)(1)(A). 5/ In Carpenters Local 22 (Graziano Construction Company) 6/ the union fined a union member because of his activities in opposition to the incumbent union leadership. The Board stated that, while a union is free under the proviso to Section 8(b)(1)(A) to enforce a properly adopted rule which reflects a legitimate union interest, " [the proviso] does not permit enforcement, by fine or expulsion, of a rule which 'invades or frustrates an overriding policy of the labor laws. . . . '" 7/ The Board then held that a fine which restrains members from full and free participation in internal union affairs not only fails to reflect a legitimate union interest but also impairs policies protected by Congress in its system of federal labor laws and therefore violates Section 8(b)(1)(A) of the Act. 8/ Moreover, the Board has

3/ The Charging Party intends to file formal charges with the Department of Labor after he has exhausted the Union's internal procedures.

4/ See, e.g., Local Lodge No. 707, Machinists (Pratt and Whitney Div.), 276 NLRB No. 105 (1985); Local 139, Operating Engineers, AFL-CIO (Wisconsin Chapter, A.G.C.), 273 NLRB No. 126 (1984) (publishing a newsletter or leaflets critical of the union is a protected Section 7 right).

5/ Local 400, Operating Engineers (Hilde Construction Co.), 225 NLRB 596 (1976) (union fines for unauthorized meeting to discuss bargaining proposals unlawfully interfered with members' LMRDA Section 101(c)(7) rights of freedom of speech and assembly and hence violated Section 8(b)(1)(A)).

6/ 195 NLRB 1 (1972).

7/ Id. at 1, quoting Scofield v. NLRB, 394 U.S. 423, 429 (1969).

8/ Id. at 2.

held that union members have a Section 7 right to resort to the Department of Labor; union retaliation against members for such actions therefore violates Section 8(b)(1)(A). 9/

In addition, the activity for which Doten was disciplined arguably involved efforts to enforce a collective-bargaining agreement, as his intra-union charge concerned the Business Agent's alleged dereliction in contractual grievance handling. As such, Doten's activity was an extension of activity that is concerted under NLRB v. City Disposal Systems. 10/

Thus, under well-established Board law, the Union violated Section 8(b)(1)(A) by fining and threatening to fine Doten because he filed an intra-union charge against the Union business agent and because he complained to the Department of Labor. The Board's recent decision in Meyers, supra, does not mandate a different conclusion even though Doten apparently was not acting with the authorization of other union members when he filed the intra-union charge.

In Meyers, supra, the Board itself acknowledges that activities based on the right of self-organization are expressly recognized by statute as concerted:

> Section 7 limits the employee rights it grants to the examples of concerted activities specifically enumerated therein - "self-organization," forming, joining, or assisting labor organizations; and bargaining collectively through representatives - and to engaging in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (emphasis in original). 11/

Traditionally, union dissident activity has been considered to be an exercise of the Section 7 right to self-organization. 12/

9/ See, e.g., Local Union No. 5163, Steelworkers, 248 NLRB 943 (1980); Buffalo Newspaper Guild (Buffalo Courier-Express), 220 NLRB 79 (1975). See also Carpenters Local Union No. 35, 264 NLRB 795 (1982) enfd. 739 F.2d 479 (9th Cir. 1984) (union violated Section 8(a)(1) and (3) when it discharged employee/members because they had complained to Department of Labor about financial and election irregularities).

10/ 465 U.S. 822 (1984). See also Local 28, Sheet Metal Workers (Treadwell Corp.), 243 NLRB 1061 (1979); Combustion Engineering Inc. (Boilermakers Local 237), 272 NLRB 957 (1984).

11/ Meyers, supra, at 494.

12/ Nu-Car Carriers, Inc., 88 NLRB 75 (1950), enfd. 189 F.2d 756 (3d Cir. 1951), cert. den. 342 U.S. 919 (1952) ("[t]he discharge of a dissident within a union when that termination is motivated by a desire to eliminate protest must inevitably result in an infringement . . . of that employee's right to self-organization. We believe that inherent in that right is the privilege of protest and persuasion of others. . . ." 88 NLRB at 76, 77.)

In NLRB v. City Disposal Systems, supra, the Supreme Court also acknowledged that those rights specifically enumerated in Section 7 are recognized as concerted by the language of the statute itself. 13/ The Court then explained the rationale behind its construction of the statute:

> [T]he acts . . . which § 7 explicitly recognizes as concerted, are related to collective action in essentially the same way that the invocation of a collectively bargained right is related to collective action. When an employee joins or assists a labor organization, his actions may be divorced in time, and in location as well, from the actions of fellow employees. Because of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity. The lone employee could not join or assist a labor organization were it not for the related organizing activities of his fellow employees . . . [N]either the individual activity nor the group activity would be complete without the other. 14/

Similarly, a union member's right to self-organize, including the right to protest and persuade others concerning an internal union matter, presumes a collective forum within which to exercise those rights. Therefore, dissident activity is by its very nature concerted, as the statute, and the Board and Supreme Court, so recognize.

Moreover, Meyers, supra, by definition is limited to situations involving the employer/employee relationship, not the union/member relationship. 15/ Indeed, in two decisions subsequent to Meyers in which the Board found Section 8(b)(1)(A) violations based on union coercion of individual union members, 16/ the Board did not cite Meyers nor treat as a legal issue the

13/ City Disposal Systems, supra, at 832.
14/ Id. at 832, 833 (citation omitted).
15/ Meyers, supra, 268 NLRB at 497. ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.") (footnotes omitted, emphasis added) Thus, for example, employee complaints to the Department of Labor with regard to employer conduct, in contrast to union member complaints as to union conduct, are protected only if the complaints are concerted within the meaning of Meyers, supra (see, e.g., Cristy Janitorial Services, 271 NLRB 857 (1984)), or within the meaning of City Disposal Systems, supra).
16/ See OCAW Local 4-23, 274 NLRB No. 63 (1985); Carpenters Local 1016 (Bertram Construction Co.), 272 NLRB 539 (1984).

fact that the union's action was directed against a member who had engaged in individual activity. In one of these cases, OCAW Local 4-23, supra, there was no evidence indicating that the individual was acting on behalf of other employees.

Finally, the fact that the Union's imposition of discipline has not affected the employment status of Doten also does not affect the conclusion reached herein. Having disciplined Doten for an impermissible reason, the Union is not privileged to rely on the proviso to Section 8(b)(1)(A) to punish Doten in any manner. In the circumstances of the instant case, the Union violated Section 8(b)(1)(A) both by fining and later threatening to fine Doten. 17/ In addition to possibly intimidating Doten through the initial fining and the threatened reinstating of the $1500 fine, this Union conduct also restrains and coerces other members who might fear similar adverse consequences should they also exercise their Section 7 rights. 18/

Based on the foregoing, the Region should issue complaint, absent settlement.

H. J. D.

17/ See, e.g., IUE Local 745 (McGraw-Edison), 268 NLRB 308 (1983), enfd. 759 F.2d 533 (6th Cir. 1985) (violation found where union threatened to fine member if he testified on behalf of employer at arbitration proceeding).

18/ See, e.g., OCAW Local Union No. 4-23 (Gulf Oil), supra. See also Local Lodge No. 707, Machinists, supra (union disciplinary proceedings against dissidents held violative even though proceedings had not been completed at time of hearing before administrative law judge). Local 100, Transport Workers (Liberty Coaches), 230 NLRB 536 (1977), where the Board dismissed the complaint, is distinguishable. In that case, the intra-union charges alleged that the member had acted improperly by filing charges with the NLRB as well as by threatening other union members, removing union literature from bulletin boards, and otherwise violating union rules. The local union expelled the employee. The international union reversed, noting that the member had a right to file charges with the Board. The complaint alleged that the union violated Section 8(b)(1)(A) by filing charges against the member because he had filed an unfair labor practice charge; the complaint did not allege that any of the other intra-union charges were unlawful. Therefore, once the international union effectively corrected the local's violation, there was no basis for finding that the union had violated the Act. This fact also distinguishes Liberty Coaches from Operating Engineers Local 139. See 273 NLRB No. 126, slip op. at 2, n. 2. In the instant case, altough the Union originally suspended the $1500 fine, the Union nevertheless publicized the fining, never indicated to Doten or others that he had a right to engage in the conduct involved herein, and then threatened to reinstate the fine if he did not actually prove his DOL and internal union charges.